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The European Arrest Warrant: Between Trust, Democracy and the Rule of Law

Introduction.

The European Arrest Warrant: Extradition in Transition

Elies van Sliedregt

The Framework Decision to establish the European Arrest Warrant (EAW) entered into force on 1 January 2004. Since the adoption of the Italian law on 22 April 2005 transposing the Decision, it has been operational throughout the European Union. In its evaluation report of January 2006, the European Commission welcomes the arrest warrant as an 'overall success', as it provides for an effective and swift surrender procedure whilst guaranteeing judicial control and the observation of fundamental rights. National evaluation reports, such as the 30th report of the House of Lords Select Committee on the European Union, show that the arrest warrant is widely used to secure the arrest and surrender across the Union. The European Arrest Warrant seems to have largely taken over traditional extradition procedures.

This overall positive appraisal does not detract from the fact that, in its application, the Eurowarrant has encountered serious problems. Three national courts have declared the implementation of the Framework Decision unconstitutional for not respecting the limitation or prohibition of the extradition of nationals.¹ Moreover, EAW implementing legislation and court decisions have created obstacles to co-operation under the Arrest Warrant scheme, obstacles that appear incompatible with the Framework Decision. As a result, applying the new scheme of judicial co-operation has not resulted in a definite farewell to classic extradition.

These developments raise fundamental issues, three of which deserve attention. Firstly, the implementation and application of the Eurowarrant has worked as a catalyst; it has forced several national courts to take position on the relationship between national (constitutional) law and (secondary) third pillar law. These

¹ See, Editorial 'Mutual Trust', 2 *EuConst* (2006) p. 1-3.

positions differ from one another as will be shown below. Secondly, the implementation and application of the Arrest Warrant give reason to believe that there is a lack of trust between EU member states when co-operating in criminal matters. The constitutional rulings can be considered evidence of reservations to mutual trust. Court decisions and EAW implementing legislation with regard to refusal grounds may equally be regarded as expressions of 'distrust'. This touches upon the third, closely connected, matter: the issue of rights and refusal grounds. Respect for the requested person's human rights (right to family life, right to work) may preclude his/her surrender by allowing reliance on a humanitarian/hardship refusal ground. This is noteworthy since reliance on such a refusal ground is reminiscent of the 'classic' extradition scheme and was expected to disappear, or at least to be limited, in the 'EAW era'.

CONSTITUTIONAL RULINGS AND CONTRAPUNCTUAL PRINCIPLES

On 27 April 2005, the Polish Constitutional Court held that the European Arrest Warrant breached the constitutional ban on extraditing Polish nationals to the authorities of another member state. Only three months later, in July 2005, the German Federal Constitutional Court annulled Germany's law transposing the Framework Decision because it did not adequately protect German citizens' fundamental rights, a condition which is required for the extradition of German nationals. In response to this decision and by applying the principle of reciprocity, the Spanish authorities then decided that they would no longer surrender nationals to Germany. In a decision of 7 November 2005, the Supreme Court of Cyprus found that the European Arrest Warrant violates a clause in the Constitution prohibiting citizens from being transferred abroad for prosecution, however, the European Arrest Warrant did survive a challenge in the Czech Constitutional Court. The Court found a way to interpret national law in conformity with the Framework Decision on the European Arrest Warrant.

While some of the court decisions on the constitutionality of EAW implementing legislation lead to the same result, the reasoning reflects different approaches. Komárek, writing on European constitutionalism and the European Arrest Warrant, analyzes these different approaches by using Maduro's contrapunctual principles.² Maduro's view of a pluralist legal order is built on the premise that no court should assume supremacy of its legal order. Instead, courts should seek consistency and coherence in the whole of the European legal order. This

² J. Komárek, 'European Constitutionalism and the European Arrest Warrant: in search of the limits of "contrapunctual principles"', 44 *CML Rev.* (2007) p. 9-40. Referring by analogy to the musical method of harmonizing different melodies that are not in a hierarchical relationship *inter se*.

would require judges to look beyond specific constitutional provisions and European Union law to find a fit with European Court of Justice decisions and other national court decisions. In essence, it requires national judges to act on behalf of the European legal order in addition to their own.

Examining the constitutional rulings in the light of the contrapunctual principles, which may also be referred to as a theory of judicial tolerance or judicial dialogue, we see a difference between the approach of the German Federal Constitutional Court and that of the Polish Constitutional Court. As Komárek points out, the German judges did not take into account the possible consequences of their decision on the European level. They did not even consider the ECJ's ruling in *Pupino*, although that judgment had been issued only a month before.³ The Polish court, on the other hand, in declaring the implementing law unconstitutional, referred to the wider context of the Framework Decision and urged the legislator to move towards a more advanced level of co-operation in criminal matters; this would allow realization of the Union's aims and strengthen Polish internal security.⁴

Leaving aside other relevant factors, such as the compatibility of the implementing legislation with the Framework Decision and the discretion it leaves courts to interpret its wording, it suffices at this point to conclude that different approaches exist to constitutional conflicts brought about by the application of the Eurowarrant. On the one hand, there is the national supremacy approach, represented by the German Federal Constitutional Court ruling, and, on the other hand, there is the approach that attempts to pay heed to European and other member states' interests represented by the Polish Constitutional Court.

It seems obvious that European interests are served best when national (constitutional) courts renounce the idea of national supremacy. This, however, may be too much to ask when it concerns co-operation in criminal matters. After all, the interests are weighty and are not adequately protected in the context of the third pillar with its democratic deficit and imperfect judicial control. Surrender proceedings may lead to the handing over of an individual – be it a national or not – for the purpose of prosecution or execution of a custodial sentence. One could argue that under such circumstances the theory of judicial dialogue should not play a dominant role and that individual concerns may be equally or more important. For the same reason one can imagine that national extradition surrender

³ C. Tomuschat, 'Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant', 2 *EuConst* (2006) p. 209-226.

⁴ See A. Lazowski, 'Poland. Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005', 1 *EuConst* (2005) p. 569-581.

courts are reluctant to adopt a 'European approach' towards implementing legislation of EAW the Framework Decision for instance, by refusing to interpret EAW implementing legislation in conformity with the Framework Decision. After all, conform interpretation with regard to the European Arrest Warrant is likely to emphasize the interest of the issuing member state rather than the interest of the individual concerned. The EAW Framework Decision, drawn up in the aftermath of the 9/11 attacks, breathes efficiency and expediency as a result of member states' desire for an informal and swift cross-border transfer of suspected persons.

Reluctance to adopt a 'European approach' in EAW cases is not generally reflected in current practice. Two rulings by the House of Lords may serve to illustrate this. On 17 November 2005 in the case of *Armas*, the House of Lords did not refuse to execute a Belgian arrest warrant for people trafficking, an offence which had partly taken place in the United Kingdom. While the specific provisions of the Extradition Act 2003 do not allow for extradition/surrender for offences that have been partly committed in the United Kingdom, the House of Lords 'repaired' this by a purposive reading of the Statute, which, it held, was instrumental in implementing the spirit and requirements of the Framework Decision. It was felt that poor drafting was not an obstacle to meeting obligations under the Framework Decision. As Baroness Hale held, 'it would be most unfortunate if the judicial authorities in our European partner states, using the form of warrant prescribed by the Framework Decision, were to find that the English judicial authorities were unable to implement it.'

In the recent case of *Dabas*, the Law Lords adopted a similar approach to the question whether the arrest warrant requires the issuing of a certificate as provided for in section 64(2)(b) and (c) of the Extradition Act 2003. Relying on *Pupino*⁵ and on the purpose of the EAW Framework Decision, the majority dismissed the appeal since it would, in the words of Lord Bingham, reintroduce 'an element of technicality'. Dissenter Lord Scott found his noble and learned friends 'reading down' provisions of the Extradition Act and removing from it a provision that Parliament thought right to include for the protection of the requested person.

MUTUAL TRUST

Paragraph 10 of the preamble to the Framework Decision on the European Arrest Warrant reads: 'The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended

⁵ See E. Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*', 3 *EuConst* (2007) p. 5-24.

only in the event of a serious and persistent breach by one of the Member States of the principles set out in Section 6(1) of the Treaty of the European Union.'

International co-operation in criminal matters requires trust in another state's criminal justice system. Such trust is often presumed when an extradition treaty exists. In the words of Justice Holmes in the *Glucksman v. Henkel* case, 'we are bound by the existence of an extradition treaty to assume that the trial will be fair'. However, no rule of international law obliges states to trust another State blindly and to co-operate with it unconditionally. In fact, many states have limited their co-operation under extradition treaties by adopting declarations, reservations and refusal grounds so they can demand guarantees and safeguards before agreeing to extradite a person. *Ne bis in idem*, *in absentia* trials, prosecution of minors, these are all grounds upon which to base a refusal to co-operate. This widespread practice of reservations and refusal grounds indicates that Parties to an extradition treaty retain their sovereignty to a certain extent. Moreover, such practice belies the idea that concluding an extradition treaty implies unlimited trust in another state's criminal justice system.

Mutual trust, or 'a high level of confidence', has been a key notion underlying the system of co-operation in criminal matters in the European Union. Mutual trust was referred to by the Council of the European Union as the 'bedrock' of the Framework Decision on the European Arrest Warrant. It provides the basis for mutual recognition, which in turn is considered to be the 'cornerstone' of EU judicial co-operation in criminal matters. In the context of the Arrest Warrant, mutual trust has been the reason for abolishing the double criminality rule for a number of crimes and for removing the executive from the decision-making process. However, it has not resulted in eliminating refusal grounds, as will appear below. How can this be explained?

The problem with 'mutual trust' as the precondition for the adoption of a norm or for the establishment of a relationship is that it is a static notion and tends towards the absolute. In reality, trust is not absolute and it is both the product and the condition of a regularly sustained communication. The EAW scheme introduces a new co-operation and communication scheme and takes time to adjust to. Direct communication between judicial authorities differs fundamentally from communication between government authorities on a case-by-case basis, as was the usual practice under the extradition scheme. Moreover, courts need to adjust to their new role of being solely responsible for scrutinizing surrender proceedings. In the process of creating a new co-operation scheme, it is no wonder that the familiar techniques of reservations and refusal grounds are relied upon. The question is whether these techniques should be viewed as expressions of sovereignty, as distrust in another state's criminal justice system, or as a means of

communication that builds mutual understanding. This brings us to the third connected theme, that of individual rights and refusal grounds.

RIGHTS AND REFUSAL GROUNDS

As said, mutual trust has not led to a drastic limitation of refusal grounds. In fact, the refusal grounds listed in the Framework Decision on the European Arrest Warrant reflect grounds of refusal that feature in extradition treaties and national extradition acts. In that sense, there is still room for ‘distrust’. There is, however, one important difference: refusal grounds are relied upon by the courts. The Euro-warrant scheme makes judicial authorities solely responsible for surrendering individuals to other member states; a responsibility they (used to) share with the executive with regard to extradition. It is interesting to see that the shift in decision-making from government authorities to judicial authorities has led some courts to be more vigorous in scrutinizing the surrender proceedings, as if to compensate for a potential loss of rights of the requested person in an efficient and accelerated surrender procedure. The German Constitutional Court decision may be understood against that background, as may the transposed legislation of several member states and certain court decisions that provide for refusal grounds that do not feature in the Framework Directive.

In November 2006, the Netherlands Supreme Court quashed three decisions of the Surrender/extradition Chamber of the Amsterdam District Court. In each of these cases, the chamber had refused to execute an arrest warrant and subsequently surrender the requested person on the basis of ‘humanitarian reasons’. The Dutch law transposing the EAW Framework Decision – the Surrender Act – does not specifically provide for such a refusal ground. Instead, the surrender chamber based its refusal on Section 13 of the Surrender Act, which more or less reproduces Section 4(7)(a) of the Framework Decision, and provides for the possibility to refuse the execution of a warrant in case the European Arrest Warrant relates to an offence that was committed in whole or in part on territory of the executing member state (i.e., Dutch territory). The application of this ‘territorial exception’ may be renounced upon request by the Dutch prosecutor but only when such request is ‘reasonable’. In other words, when the request is deemed ‘unreasonable’, the Surrender Chamber may refuse execution of the warrant. The chamber understood ‘unreasonable’ to include reasons of a humanitarian nature. When the requested person’s personal situation (family, job, health) requires him/her to stay in the Netherlands, a request by the prosecutor *not* to refuse the surrender despite the fact that (part of) the conduct has been committed in the Netherlands must be dismissed.

This reasoning was not acceptable to the Supreme Court. The Court held that the legislator never intended to include a hardship/humanitarian refusal ground

in Section 13. The 'unreasonable' clause only concerns prosecutorial matters: in situations where all the evidence is in the issuing State, such as witnesses and co-accused, the territorial exception of Article 13(1) may not be invoked. The Supreme Court further held that Section 13(2) of the Surrender Act cannot be regarded as the equivalent of Section 10(2) of the Extradition Act that *does* provide for a humanitarian refusal ground. The Framework Decision (Section 24(2)) and the transposed Surrender Act (Article 35(3)) only allow for humanitarian reasons to *delay* surrender proceedings, not to *refuse* it.

The Surrender Chamber had been creative in inserting a humanitarian refusal ground into the Surrender Act. By analogy with Section 10(2) of the Extradition Act, it enabled refusal on 'humanitarian grounds'. The provision that delays surrender proceedings was not considered to sufficiently deal with situations of hardship. The requested person may suffer from a long-term disease such as AIDS or cancer, a situation that will continue and worsen rather than improve, making the refusal of surrender even more pertinent. The Supreme Court, however, pointed out that the Dutch legislator did not intend to include such a ground in the Surrender Act and that Article 13 may not function as such. This leaves unanswered the question of whether the Framework Decision provides for a humanitarian refusal ground. The answer seems to be in the negative. The fact that the Framework Decision provides for a delay in surrender proceedings rather than a definite refusal may *a contrario* mean that the member states did not intend to include such a refusal ground. This reading is supported by comments of the Commission in its report evaluating the European Arrest Warrant where it criticizes Italy for introducing grounds of refusal concerning the personal and family situation of the individual in question while such a refusal ground is not provided for in the Framework Decision. On the other hand, one could argue that the humanitarian refusal ground can be based on principles of Community law, such as the proportionality principle or on the EU Charter of Fundamental Rights. Be that as it may, what the above goes to show is that judicial authorities may be inclined to adopt a more vigorous test of surrender proceedings than allowed for under the European Arrest Warrant scheme, simply because they are the ones solely responsible. Taking out the executive may be more efficient and expedient; it may *also* have the (adverse) effect of a more vigorous examination of surrender proceedings.

On 3 May 2007, the European Court of Justice ruled on the first preliminary reference on the Framework Decision on the European Arrest Warrant.⁶ The preliminary ruling was asked for by the Belgian Court of Arbitration upon complaint by the organization *Advocaten voor de Wereld*. The latter argued that (i) the

⁶ ECJ Case C-303/05, 3 May 2007.

European Arrest Warrant should not have been regulated by means of a Framework Decision but instead by a convention, and (ii) that the Framework Decision violates the principles of equality and non-discrimination as well as the principle of legality by abolishing the requirement of double-criminality assessment for the criminal offenses listed under Article 2(2) of the Framework Decision.

The Court rejected both arguments. Addressing the first argument, the Court ruled that it is up to the Council of the European Union to choose the instruments by which it wishes to legislate in fields previously governed by international conventions. The Court further pointed out that, according to Article 31(1)(a) and (b) EU Treaty, the Council is not bound to resort to any specific legal instrument in striving for 'closer cooperation between judicial and other authorities of the Member States in accordance with the provisions of Article 31 (EU) and 32 (EU)'. With regard to the question of equality and non-discrimination, the Court held that the 'inequality' was justified since the 32 categories of offences on the list 'feature among those the seriousness of which in terms of adversely affecting public order and safety justifies dispensing with the verification of double criminality'⁷. Finally, the Court held that Article 2(2) of the Framework Decision does not violate the principle of legality. The list of Article 2(2) only provides for *categories* of offences whilst 'the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing member state'⁸. In other words, it is only at state level that the principle could be infringed.

The ruling is hardly unexpected. The complaint by the *Advocaten voor de Wereld* was not targeting the real problems of the Framework Decision on the European Arrest Warrant. It would be interesting to hear the Court's view on refusal grounds and their (in)compatibility with the Framework Decision, particularly with regard to the hardship/humanitarian refusal ground as discussed above. The Court's ruling may, however, be welcomed for the attention it draws to the 'legal protection side' of the European Arrest Warrant, which until now has been overshadowed by the efficiency and expediency concerns that played such an important role in drafting the Framework Decision.

CONCLUDING OBSERVATIONS

What the above illustrates is that it is hard to say goodbye to extradition. Providing for additional refusal grounds in transposed legislation (Italy) or in case-law (the Dutch court decisions) and adhering to the reciprocity principle (Spain with regard to German refusal to surrender national) leaves member states room to

⁷ Ibid., para. 57.

⁸ Ibid., para. 53.

retain their sovereignty and to refuse to execute a European Arrest Warrant. The EAW scheme may be built on 'mutual trust'; like extradition, this does not imply unconditional trust. The European Arrest Warrant for all its innovations may still be regarded as extradition, albeit in a more expedited and dressed-down form.

With these observations, I would like to introduce a series on the European Arrest Warrant. The focus of the series will be on the different approaches national courts have towards the EAW. Whether we call the approach 'contrapunctual' or 'European', whether it concerns constitutional courts or surrender/extradition courts, it is clear that different courts adopt different attitudes to co-operating under the European Arrest Warrant scheme. Padfield, in this issue, will discuss the House of Lords approach. The articles in the series will further examine transposed legislation, its compatibility with the Framework Decision and its constitutionality on the national level.

